

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

PATRICIA HARRIS LEE,	X	
	:	
Plaintiff,	:	07 CV 6733 (CM)
	:	
v.	:	
	:	
SONY BMG MUSIC ENTERTAINMENT, INC.	:	
and BARBARA WARNOCK-MORGAN,	:	
Individual,	:	
	:	
Defendants.	:	
	X	

**MEMORANDUM OF LAW IN SUPPORT
OF DEFENDANTS' MOTION TO DISMISS, OR
ALTERNATIVELY, FOR SUMMARY JUDGMENT**

JONATHAN D. DAVIS, P.C.
99 Park Avenue
Suite 1600
New York, New York 10016
(212) 687-5464
Attorneys for Defendants
SONY BMG MUSIC ENTERTAINMENT
And Barbara Warnock-Morgan

TABLE OF CONTENTS

Preliminary Statement.....	1
BACKGROUND FACTS.....	3
A. The Amended Complaint.....	3
B. Facts Relative To Summary Judgment	5
ARGUMENT.....	9
POINT I	9
THE AMENDED COMPLAINT SHOULD BE DISMISSED.....	9
A. Governing Standards.....	9
1. The Disability Discrimination Claims Must Be Dismissed	10
2. The Racial And National Origin Discrimination Claims Must Be Dismissed	16
3. Plaintiff Fails To Allege Outrageous Conduct.....	20
4. Leave To Amend Should Be Denied	21
POINT II	22
DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT	22
A. Governing Standards.....	22
B. Plaintiff Has Not Raised A Triable Issue of Material Fact On Any Claim	23
CONCLUSION.....	25

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Ahmed v. Samson Management Corp.</i> , 1996 WL 183011 (S.D.N.Y. Apr. 17, 1996).....	20
<i>Alfano v. Costello</i> , 294 F.3d 365 (2d Cir. 2002).....	14, 17
<i>Alonzo v. Chase Manhattan Bank, N.A.</i> , 25 F. Supp.2d 455 (S.D.N.Y. 1998).....	21
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242, 106 S. Ct. 2505 (1986).....	22
<i>Aspex Eyewear, Inc. v. Clariti Eyewear, Inc.</i> , 2008 WL 219765 (S.D.N.Y. Jan. 24, 2008)	9
<i>Bell Atlantic Corp. v. Twombly</i> , ___ U.S. ___, 127 S. Ct. 1955 (2007).....	9, 10
<i>BellSouth Telecomms., Inc. v. W. R Grace & Co.</i> , 77 F.3d 603 (2d Cir. 1996).....	22
<i>Benjamin v. New York City Dept. of Health</i> , 17 Misc. 3d 1122(A), 2007 WL 3226958 (Sup. Ct. N.Y. Co. Oct. 23, 2007).....	18
<i>Billinger v. Bell Atlantic</i> , 240 F. Supp.2d 274 (S.D.N.Y. 2003), <i>aff'd</i> , 124 Fed. Appx. 669 (2d Cir. Jan. 21, 2005), <i>cert. denied</i> , 546 U.S. 843, 126 S. Ct. 90 (2005).....	24
<i>Brewster v. City of Poughkeepsie</i> , 447 F. Supp.2d 342 (S.D.N.Y. 2006).....	18
<i>Brightman v. Prison Health Serv., Inc.</i> , 2007 WL 1029031 (E.D.N.Y. Mar. 30, 2007).....	14, 15
<i>California Motor Transp. Co. v. Trucking Unlimited</i> , 404 U.S. 508, 92 S. Ct. 609 (1972).....	9
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317, 106 S. Ct. 2548 (1986).....	22

<i>Cheung v. Merrill Lynch, Pierce, Fenner & Smith, Inc.</i> , 913 F. Supp. 248 (S.D.N.Y. 1996)	18, 21
<i>Cordoba v. Beau Dietl & Assocs.</i> , 2003 WL 22902266 (S.D.N.Y. Dec. 8, 2003)	18
<i>Dedyo v. Baker Eng'r New York, Inc.</i> , 1998 WL 9376 (S.D.N.Y. Jan. 13, 1998)	13, 23
<i>Demirovic v. Building Service 32 B-J Pension Fund</i> , 467 F.3d 208 (2d Cir. 2006).....	24
<i>Dixit v. City of New York Dep't of Gen. Servs.</i> , 972 F. Supp. 730 (S.D.N.Y. 1997)	18
<i>Druschke v. Banana Republic, Inc.</i> , 359 F. Supp.2d 308 (S.D.N.Y. 2005).....	21
<i>Edwards v. City of New York</i> , 2005 WL 3466009 (S.D.N.Y. Dec. 19, 2005)	23
<i>Espinoza v. Farah Mfg. Co.</i> , 414 U.S. 86, 94 S. Ct. 334 (1973).....	17, 18
<i>Fahmy v. Duane Reade, Inc.</i> , 2005 WL 2338711 (S.D.N.Y. Sept. 26, 2005).....	18, 19, 21
<i>Fiscina v. New York City Dist. Council of Carpenters</i> , 401 F. Supp.2d 345 (S.D.N.Y. 2005), <i>aff'd</i> , 206 Fed. Appx. 8 (2d Cir. Sept. 19, 2006)	13, 23
<i>Foman v. Davis</i> , 371 U.S. 178, 83 S. Ct. 227 (1962).....	21
<i>Franchitti v. Bloomberg, L.P.</i> , 2004 WL 2366183 (S.D.N.Y. Oct. 20, 2004).....	19
<i>Frasier v. General Elec. Co.</i> , 930 F.2d 1004 (2d Cir. 1991).....	9
<i>Fuller v. J.P. Morgan Chase & Co.</i> , 423 F.3d 104 (2d Cir. 2005).....	24
<i>Gavish v. Revlon, Inc.</i> , 2004 WL 2210269 (S.D.N.Y. Sept. 30, 2004).....	9

<i>Ghose v. Century 21, Inc.</i> , 108 F. Supp.2d 373 (S.D.N.Y. 2000), <i>aff'd</i> , 12 Fed. Appx. 52 (2d Cir. June 14, 2001)	19
<i>Giordano v. City of New York</i> , 274 F.3d 740 (2d Cir. 2001).....	10
<i>Harris v. Forklift Sys., Inc.</i> , 510 U.S. 17, 114 S. Ct. 367(1993).....	13, 14
<i>Harrison v. Indosuez</i> , 6 F. Supp.2d 224 (S.D.N.Y. 1998)	15
<i>Harrison v. New York City Housing Auth.</i> , 2001 WL 1658243 (S.D.N.Y. Dec. 26, 2001)	11, 15
<i>Heyer v. The City of New York</i> , 2007 WL 951381 (S.D.N.Y. Mar. 29, 2007)	18
<i>Hill v. Milford v. N.Y.C. Bd. Of Health</i> , 2005 WL 195561 (E.D.N.Y. Jan 27, 2005)	23
<i>Howell v. New York Post Co.</i> , 81 N.Y.2d 115, 596 N.Y.S.2d 350 (1993)	20
<i>Iqbal v. Hasty</i> , 490 F.3d 143 (2d Cir. 2007).....	10
<i>James v. Federal Reserve Bank Of New York</i> , 2005 WL 1889859 (E.D.N.Y. Aug. 8, 2005), <i>adhered to on reconsideration</i> , 471 F. Supp.2d 226 (E.D.N.Y. 2007)	10, 11, 14, 21
<i>Jones v. New York State Div. of Military and Naval Affairs</i> , 186 F.3d 45 (2d Cir. 1999).....	21
<i>Kato v. Ishihara</i> , 239 F. Supp.2d 359 (S.D.N.Y. 2002), <i>aff'd</i> , 360 F.3d 106 (2d Cir. 2004)	16
<i>Kim v. Dial Service Intern., Inc.</i> , 1997 WL 5902 (S.D.N.Y. Jan. 8, 1997)	19
<i>K.M.B. Warehouse Distributors, Inc. v. Walker Mfg. Co.</i> , 61 F.3d 123 (2d Cir. 1995).....	20

<i>Leibowitz v. Bank Leumi Trust Co.</i> , 152 A.D.2d 169, 548 N.Y.S.2d 513 (2d Dep't 1989)	21
<i>Leopold v. Baccarat, Inc.</i> , 174 F.3d 261 (2d Cir. 1999).....	16
<i>Mandell v. County of Suffolk</i> , 316 F.3d 368 (2d Cir. 2003).....	19
<i>Mariani v. Consolidated Edison Co. of New York, Inc.</i> , 982 F. Supp. 267 (S.D.N.Y. 1997), <i>aff'd</i> , 172 F.3d 38 (2d Cir. 1998)	20
<i>Martin v. New York State Dep't of Mental Hygiene</i> , 588 F.2d 371 (2d Cir. 1978).....	19
<i>Martinez v. Simonetti</i> , 202 F.3d 625 (2d Cir. 2000).....	20
<i>Mathura v. Council For Human Services Home Care Services, Inc.</i> , 1996 WL 157496 (S.D.N.Y. April 2, 1996)	23
<i>Matsushita Electric Industrial Co. Ltd. v. Zenith Radio Corp.</i> , 475 U.S. 574, 106 S. Ct. 1348 (1986).....	22
<i>In re Merrill Lynch Ltd. Partnerships Litigation</i> , 154 F.3d 56 (2d Cir. 1998).....	20
<i>Mescall v. Marra</i> , 49 F. Supp.2d 365 (S.D.N.Y. 1999).....	11, 12, 15
<i>Milford v. New York City Board of Health</i> , 2005 WL 195561 (E.D.N.Y. Jan. 27, 2005), <i>aff'd</i> , 158 Fed. Appx. 354 (2d Cir. Dec. 20, 2005)	18
<i>Murphy v. American Home Products Corp.</i> , 58 N.Y.2d 293, 461 N.Y.S.2d 232 (1983)	21
<i>Nakis v. Potter</i> , 2004 WL 2903718 (S.D.N.Y. Dec. 15, 2004)	14
<i>Pace v. Paris Maint. Co.</i> , 107 F. Supp.2d 251 (S.D.N.Y. 2000), <i>aff'd</i> , 7 Fed. Appx. 94 (2d Cir April 3, 2001).....	10

<i>Pacific Health Advantage v. Cap Gemini Ernst & Young</i> , 2007 WL 2619052 (S.D.N.Y. Sept. 6, 2007).....	9
<i>Patane v. Clark</i> , 508 F.3d 106 (2d Cir. 2007).....	10
<i>Pimentel v. Citibank, N.A.</i> , 29 A.D.3d 141, 811 N.Y.S.2d 381 (1st Dep't 2006)	12
<i>Podell v. Citicorp Diners Club, Inc.</i> , 112 F.3d 98 (2d Cir. 1997).....	22
<i>Potter v. Xerox Corp.</i> , 88 F. Supp.2d 109 (W.D.N.Y. 2000), <i>aff'd</i> , 1 Fed. Appx. 34 (2d Cir. Jan. 5, 2001)	12, 13, 23
<i>Prince v. Cablevision Systems Corp.</i> , 2005 WL 1060373 (S.D.N.Y. May 6, 2005)	14, 17
<i>Quinn v. Green Tree Credit Corp.</i> , 159 F.3d 759 (2d Cir. 1998).....	15, 17
<i>Raisley v. First Manhattan Co.</i> , 4 Misc. 3d 1022(A), 798 N.Y.S.2d 347, 2004 WL 2059539 (Sup. Ct. N. Y. Co. Sept. 9, 2004)	11
<i>Realmuto v. Yellow Freight System, Inc.</i> , 712 F. Supp. 287 (E.D.N.Y. 1989)	20, 21
<i>Rivera v. Baccarat, Inc.</i> , 1996 WL 251850 (S.D.N.Y. May 10, 1996)	21
<i>Rowe v. William Morris Agency, Inc.</i> , 1999 WL 335139 (S.D.N.Y. May 26, 1999)	19
<i>Russo-Lubrano v. Brooklyn Federal Sav. Bank</i> , 2007 WL 121431 (E.D.N.Y. Jan. 12, 2007)	17, 21
<i>Saint Francis College v. Al-Khazraji</i> , 481 U.S. 604, 107 S. Ct. 2022 (1981).....	19
<i>Scannell v. Metropolitan Life Ins. Co.</i> , 2003 WL 22722954 (S.D.N.Y. Nov. 18, 2003).....	24
<i>Silberstein v. Advance Magazine Publishers, Inc.</i> , 988 F. Supp. 391 (S.D.N.Y. 1997)	21, 24

<i>Straker v. Metropolitan Transit Authority</i> , 333 F. Supp.2d 91 (E.D.N.Y. 2004)	17
<i>Thompson v. Federal Reserve Bank of New York</i> , 2004 WL 330243 (S.D.N.Y. Feb. 23, 2004)	12, 23
<i>Tomka v. Seller Corp.</i> , 66 F.3d 1295 (2d Cir. 1995)	14, 19
<i>Wanamaker v. Columbian Rope Co.</i> , 713 F. Supp. 533 (N.D.N.Y. 1989)	20, 21
<i>Watts v Services for the Underserved</i> , 2007 WL 1651852 (E.D.N.Y. June 6, 2007)	17
<i>Wehling v. Bayex, Inc.</i> , 248 A.D.2d 973, 670 N.Y.S.2d 277 (4th Dep't 1998)	15
<i>Whyte v. Contemporary Guidance Servs.</i> , 2004 WL 1497560 (S.D.N.Y. July 2, 2004)	16, 17
<i>Williams v. Brooklyn Union Gas Co.</i> , 819 F. Supp. 214 (E.D.N.Y. 1993)	15
<i>Wrighten v. Glowski</i> , 232 F.3d 119 (2d. Cir. 2000)	19
<i>X-Men Security, Inc. v. Pataki</i> , 983 F. Supp. 101 (E.D.N.Y. 1997), reversed in part on other grounds, 196 F.3d 56 (2d Cir. 1999)	19
<i>Yusuf v. Vassar College</i> , 35 F.3d 709 (2d Cir, 1994)	19

Statutes And Regulations

29 C.F.R. §1630.2(i)	11
29 C.F.R. §1630.2(j)(3)(i)	11
New York Worker's Compensation §120	15
42 U.S.C. §1981	16, 19, 20, 23
Rule 12(b)(6), Fed. R. Civ. P.	1, 9

Rule 56(c), Fed. R. Civ. P.....	1, 22
---------------------------------	-------

Other Authorities

<i>Restatement (2d) of Torts</i> §46(1)	20
---	----

Preliminary Statement

This memorandum of law is respectfully submitted on behalf of Defendant SONY BMG MUSIC ENTERTAINMENT ("SONY BMG") and Barbara Warnock-Morgan ("Warnock-Morgan") in support of their motion, pursuant to Rule 12(b)(6), Fed. R. Civ. P., for an order dismissing the Amended Complaint, dated November 29, 2007 ("Amended Complaint") for failure to state a claim upon which relief can be granted or, alternatively, for summary judgment, pursuant to Rule 56(c), Fed. R. Civ. P.

Plaintiff's scattershot Amended Complaint purports to allege federal and state claims for discrimination based on disability, race and/or national origin, and a state-law claim for intentional infliction of emotional distress. The gist of her complaint is that as a result of a heated exchange with her supervisor, Defendant Barbara Warnock-Morgan ("Warnock-Morgan"), Plaintiff suffered severe emotional distress. After SONY BMG's third-party insurance carrier denied her request for disability, Plaintiff failed to return to work. She remains in SONY BMG's employment on unpaid leave status.

Plaintiff's lone allegation that she suffered a stress-related disability because of a single encounter with her supervisor does not state a claim under any federal or state-law that provides remedies for the disabled. Moreover, Plaintiff fails to allege that she requested and was denied a reasonable accommodation. Her claim that she was denied disability benefits does not state a claim under the federal or state disability laws. Plaintiff's hostile work environment claims, based on her subjective reaction to the same single encounter with Warnock-Morgan, are not based on discriminatory animus and do not approximate the severe or pervasive conditions necessary for such claims. Her